Appeal No. 2005AP1507 **Cir. Ct. No. 2003CV504**

WISCONSIN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

WILLIAM F. SCHWEDA, JEFFREY G. SCHWEDA, AND ECI SPECIAL WASTE SERVICES, INC.,

DEFENDANTS-APPELLANTS.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Snyder, P.J., Nettesheim and Anderson, JJ.

Pursuant to WIS. STAT. RULE 809.61 (2003-04),[1] this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

ISSUE

Under the test set forth in ***Village Food & Liquor Mart v. H & S Petroleum, Inc.***, 2002 WI 92, 254 Wis. 2d 478, 647 N.W.2d 177, does the constitutional right to a jury trial attach in an action for violations of waste disposal regulations where common-law nuisance theory provides the foundation

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise stated.

for modern environmental law, but forfeiture actions for improper treatment of wastewater and hazardous waste did not exist in 1848?

BACKGROUND

The facts relevant to the certified issue are brief and undisputed. ECI Special Waste Services, Inc., a "centralized waste treater" within the meaning of WIS. ADMIN. CODE § NR 211.03(2e) (Oct. 2002),[2] collects waste from client industries, transports the waste to its treatment facility, treats the waste to comply with specific discharge limitations, and then discharges the waste via sanitary sewer into the city of Fond du Lac's municipal wastewater treatment plant. ECI's discharges into the city's treatment system are governed by a pretreatment permit issued by the city. This permit authorizes ECI to discharge wastewater into the city's system only in accordance with effluent limitations, monitoring requirements and other conditions set forth in the permit and in compliance with WIS. ADMIN. CODE ch. NR 211.

On September 11, 2003, the State filed a complaint against ECI and its owners alleging several violations of the terms of the permit and of requirements imposed by the state administrative code and state statutes. The State made fifteen claims for relief, including causing the city to exceed its discharge standards by releasing surfactant-laden wastewater into the city's treatment system, illegally discharging sludge into a drain in ECI's truck wash bay, accepting a category of waste other than what was covered by the permit, expanding its facility and its capacity without approval from the Department of

[2] All references to the Wisconsin Administrative Code are to the October 2002 version unless otherwise noted.

Natural Resources (DNR), and failing to take samples of its wastewater discharge to assess compliance with the permit. Other claims involved improper characterization, handling, and disposal of hazardous waste.

The State sought forfeitures pursuant to WIS. STAT. §§ 281.98(1), 283.91(2), 289.96(3)(a) and 291.97(1), plus penalties pursuant to WIS. STAT. § 757.05(1)(a), and the environmental assessment available under WIS. STAT. § 299.93. The State also sought an injunction against ECI, along with costs and fees associated with the action.

ECI demanded a jury trial and the State moved to strike. The circuit court heard arguments on September 30, 2004, and ultimately granted the State's motion. The court concluded that ECI "failed to show that this action meets either of the two prongs in the ***Village Food*** test for entitlement to a jury trial." Following a trial to the court, judgment was granted in favor of the State in the amount of $365,373.54. This amount comprised forfeitures, penalties, surcharges, costs, and attorney fees assessed against ECI. ECI appeals, alleging the court erred by striking its demand for a jury trial.[3]

DISCUSSION

The issue presented implicates article I, section 5 of the Wisconsin Constitution, which preserves the right of trial by jury by stating, "[T]he right of trial by jury shall remain inviolate." That is, "The right to trial by jury preserved by the constitution is the right as it existed at the time of the adoption of the

[3] On appeal, ECI also alleges insufficiency of the evidence and an erroneous exercise of discretion in assessing statutory forfeitures. We are satisfied that these arguments can be addressed under existing law.

constitution in 1848." ***Town of Burke v. City of Madison***, 17 Wis. 2d 623, 635, 117 N.W.2d 580 (1962). The parties agree that the issue is governed by the test set forth in ***Village Food***. "[A] party has a constitutional right to have a statutory claim tried to a jury when: (1) the cause of action created by the statute existed, was known, or was recognized at common law at the time of the adoption of the Wisconsin Constitution in 1848 and (2) the action was regarded at law in 1848." ***Village Food***, 254 Wis. 2d 478, ¶11.

The first part of the ***Village Food*** test requires the current action to be "essentially [a] counterpart[]" to a legal cause of action existing in 1848. ***Id.***, ¶28. ECI asserts that environmental actions for pollution are founded on common-law nuisance actions, which existed well before 1848. Indeed, liability for environmental nuisances hearkens back to the early seventeenth century. *See* ***William Aldred's Case***, 9 Co. Rep. 57b (K.B. 1610). In this important decision, noted English jurist Sir Edward Coke wrote:

> [I]f the stopping of the wholesome Air, give cause of Action, *a fortiori* an Action upon the case lieth in the Case at Barr, for the infecting and corrupting of the Air. And the building of a Lime-kill is good and profitable, but if it be built so near a house, that when it burneth the smoke thereof entereth into the house, so that none can dwell there, an action lieth for it. So that if a man have a watercourse running in a ditch from the River to his house, for his necessary use, If a Glover set up a Lime-pit for Calves skins, and Sheep skins, so near the said Watercourse, that the corruption of the Lime-pit hath corrupted it, for which cause his Tenants leave the said house, an action upon the case lieth for the same, as it is adjudged in *13 Hen. 7 26b.* and the same stands both with the Rule of Law and Reason ….

Id., at 58b-59a (footnote omitted).

For more recent corroboration, ECI turns to WILLIAM H. RODGERS, JR., HANDBOOK ON ENVIRONMENTAL LAW § 2.1, at 100 (2d ed. 1977), which states: "The deepest doctrinal roots of modern environmental law are found in principles of nuisance. Nuisance actions have involved pollution of all physical media—air, water, land—by a wide variety of means…. Nuisance theory and case law is the common law backbone of modern environmental and energy law."

The Wisconsin legislature addressed private nuisance actions in Chapter 110 of the Revised Statutes of 1849. This chapter authorized a plaintiff to sue for nuisance abatement, damages, and costs. WIS. STAT. ch. 110(1) (1849). The legislature provided that the "circuit court for any county shall have equity jurisdiction in all matters concerning nuisances, where there is not a plain, adequate and complete remedy at law, and may grant injunctions to stay or prevent nuisances." Sec. 110(5).

Nuisance theory in the mid-nineteenth century provided a means to recover damages for harm to homes, farms, and businesses or injunctions to stop a polluting entity from continuing its noxious trade in populated areas. *See* Christine Meisner Rosen, *'Knowing' Industrial Pollution: Nuisance Law and the Power of Tradition in a Time of Rapid Economic Change, 1840-1864*, 8 ENVTL. HIST. [ISSUE 4], ¶1 (Oct. 2003), http://www.historycooperative.org/journals/eh/8.4/rosen.html. Courts were often faced with a choice between prohibiting an industry from plying its trade or allowing harm to a plaintiff's property. *See* Louise A. Halper, *Nuisance, Courts and Markets in the New York Court of Appeals, 1850-1915*, 54 ALB. L. REV. 301, 303-04 (1989-90).

The history of nuisance doctrine during the Industrial Revolution is complicated for its "fundamental reorientation of much previously entrenched common law doctrine." D.M. Provine, *Balancing Pollution and Property Rights: A Comparison of the Development of English and American Nuisance Law*, 7 ANGLO-AM. L. REV. 31, 31 (1978). "The transformation of once-familiar nuisance principles to accommodate the fruits of the Industrial Revolution was a particularly striking element of this legal reorientation … [and] judges drastically altered the rights of litigants, while at the same time disavowing any intent to rewrite the common law." ***Id.***

As one commentator explains, the case law "reveals the trouble judges had applying a precedent-based common law system to the unprecedented environmental impacts of the [I]ndustrial [R]evolution." Rosen, *supra*, ¶8. Referencing what she calls "traditional nuisance industries" (such as breweries, slaughterhouses, bone-boiling and fat-melting industries), Rosen explains that "Americans had a long history of using nuisance law to defend themselves from this kind of [odiferous] industrial pollution." ***Id.***, ¶¶11-12.

New industries, such as textile mills, iron mills, steam-powered sawmills and other metal-working industries experienced "explosive growth between 1840 and 1865" and transformed the pollution problem from one of small, local scale to "mass production that created serious air, water, and noise pollution problems." Rosen, *supra*, ¶26. Rosen explains:

> [T]he notion of a legally actionable material nuisance becomes a cultural construct that has relatively little to do with objective measures of environmental harm and a great deal to do with American society's environmental cultural traditions and folk wisdom…. Americans did not develop modern understandings of and terms for air and water pollution until the late nineteenth century.

Id., ¶67. It is precisely during this accelerated evolution of nuisance law that Wisconsin's constitution was adopted.

In ***Village Food***, the court addressed violations of minimum markup laws under WIS. STAT. § 100.30, the Unfair Sales Act. ***Village Food***, 254 Wis. 2d 478, ¶¶17-18, 27. The court concluded that the legislative intent underlying the Unfair Sales Act was to "provide an additional means of enforcement" of unfair trade practice laws. ***Id.***, ¶29. ECI argues that here, likewise, the DNR rules merely provide an additional means of enforcement for antipollution laws. Because nuisance actions were available to combat pollution well before 1848, and because modern environmental law is an outgrowth of common nuisance law, ECI concludes that the first prong of the ***Village Food*** test is met.

The State responds that ECI has failed to identify any action existing in 1848 that could be recognized as a claim to prevent pollution from the improper handling of wastewater or hazardous waste. It insists that a forfeiture action "is a statutory action at law," and no counterpart to the current system of forfeitures and statutory penalties existed in 1848. *See* ***County of Columbia v. Bylewski***, 94 Wis. 2d 153, 162, 288 N.W.2d 129 (1980).

However, in ***The Metropolitan Board of Health v. Heister***, 37 N.Y. 661, 662 (1868), the New York Court of Appeals addressed a public nuisance complaint against a butcher operating a slaughterhouse in a densely populated area of the city. Concluding that such public health matters were properly regulated by the government, the court observed:

> In 1796, the legislature enacted that "it shall be lawful for the mayor [and common council] … to make by-laws and ordinances … for cleaning and scouring streets, alleys, sinks, and for regulating all manufactures of soap, candles, glue, leather … and all works, trades or business causing

> noxious effluvia or vapor … under such penalties of fines and forfeitures as shall be reasonable."

Id. at 669 (citation omitted).

Furthermore, the Seventh Circuit Court of Appeals recognized that the interests protected by the Clean Water Act "overlap to a great extent the interests that nuisance law protects." ***Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs***, 101 F.3d 503, 505 (7th Cir. 1996). There, the court analyzed the type of harm a common-law nuisance doctrine sought to protect. The court stated:

> A reduction in property values caused by activities on a neighboring piece of land, and an assault on the senses by noise, dust, and odors, are just the kinds of harm that common law suits to abate a nuisance are designed to redress…. The [Clean Water] Act is directed immediately against water pollution but ultimately against the harms that water pollution produces…. [T]he major difference is that environmental statutes regulate more subtle and attenuated harms than the common law of nuisance does; a land use that creates a common law nuisance is thus likely to be an *a fortiori* violation of a statutory environmental law. The significance of this point is that a statutory violation that has nuisance-like consequences may confer standing on the persons harmed by those consequences ….

Id. The unresolved question is whether the "overlap" between modern environmental law and its system of civil forfeitures and penalties for improper treatment and discharge of waste demonstrates a sufficiently analogous relationship to antipollution actions known in 1848.

Assuming, for the sake of argument, that the first prong of the ***Village Food*** test is met, the parties argue vigorously as to the second; that is, whether such nuisance actions were regarded at law in 1848. *See* ***Village Food***, 254 Wis. 2d 478, ¶11. The State argues that public nuisance claims were equitable

in nature and directs us to ***State ex rel. Hartung v. City of Milwaukee***, 102 Wis. 509, 512, 78 N.W. 756 (1899), for the proposition that "remedies in equity by way of injunction in case of a public nuisance were well understood at common law." Furthermore, "[i]njunctions to prevent nuisances have always been rendered in courts of chancery and not by courts of law." ***Kamke v. Clark***, 268 Wis. 465, 478c, 68 N.W.2d 727 (1955).

ECI counters that, although injunctions are equitable remedies, the monetary damages sought by the State are not. Indeed, "[a] suit for an injunctional order differs from an action to recover a forfeiture in that an action for injunctional relief before a court of competent jurisdiction is an action in equity as opposed to *a forfeiture action, which is a statutory action at law*." ***Bylewski***, 94 Wis. 2d at 162 (emphasis added). ECI asserts that it is entitled to a jury trial because the State's action primarily seeks monetary damages and the injunction is only incidental.[4]

Early case law is divided as to whether nuisance actions were equitable or legal, and whether litigants were entitled to a jury trial. In a strongly worded opinion, the ***Heister*** court held it to be "clear that in questions relating to the public health, where the public interests required action to be taken, a jury had not been the ordinary tribunal to determine such questions prior to the adoption of the Constitution of 1846." ***Heister***, 37 N.Y. at 669. Likewise, the court in ***Crocker First Federal Trust Co. v. United States***, 38 F.2d 545, 546 (9th Cir. 1930), determined that an "action to abate a nuisance may be rightfully brought

[4] ECI states that its facility was closed for more than a year before the State filed suit. We note that the trial court did not grant injunctive relief; rather, the judgment is limited to monetary awards.

before a court of equity sitting without a jury." The ***Crocker*** court, however, was interpreting the specific terms of the National Prohibition Act.

In contrast, an indictment for creating "unwholesome smokes, vapors, smells and stenches" was tried to a jury in ***Commonwealth v. Brown***, 54 Mass. (13 Met.) 365, 366 (1847). There, the primary issue was whether the trial court properly instructed the jury on the evidence relevant to the indictment. ***Id.*** at 368. In ***Baughman v. American Telephone and Telegraph Co.***, 378 S.E.2d 599, 600 (S.C. 1989), the court stated, "A plaintiff is entitled to a jury trial in a nuisance action if the main purpose of the suit is to secure damages." The court further held that the defendant was entitled to a jury trial, and the trial court's order to the contrary was error. ***Id.*** at 600-01.

As this discussion demonstrates, several different remedies can be pursued in nuisance cases. Modern remedies for a nuisance include summary abatement, a suit in equity for injunctive relief, an action at law for damages, or criminal prosecution. ***Physicians Plus Ins. Corp. v. Midwest Mut. Ins. Co.***, 2002 WI 80, ¶22 n.18, 254 Wis. 2d 77, 646 N.W.2d 777 (citing 66 C.J.S. *Nuisances* § 84, at 631 (1998)). Several cases that discuss the interplay between injunctive relief and compensatory relief refer back to the case of ***The Mohawk Bridge Co. v. The Utica & Schenectady Railroad Co.***, 6 Paige Ch. 554 (N.Y. Ch., 1837). There, Mohawk Bridge and twenty-four others applied for an injunction to prevent the railroad from constructing a bridge across the Mohawk River. ***Id.*** The court explained that, as a court of chancery, it had to assess whether impending danger to property existed:

> [T]he natural remedy of the complainants for any damage they may sustain by an improper construction [of a bridge], to their injury, is by a suit at law, after such injury has actually occurred. The jurisdiction of this court, however,

> to interfere by injunction to prevent the erection of a nuisance to the serious and irreparable damage of a complainant is now too well settled to be longer questioned…. If the thing sought to be prohibited is in itself a nuisance, the court will interfere to stay irreparable mischief, where the complainant's right is not doubtful, without waiting for the result of a trial. But where the thing sought to be restrained is not in itself noxious … the court will refuse to interfere until the matter has been tried at law ….

Id.

In ***Walker v. Shepardson***, 2 Wis. 282 [*384], 283-84, [*386-87] (1853), the supreme court took up the issue of whether Shepardson was creating a nuisance by driving pilings into the bed of the Milwaukee River in front of Walker's riverfront property. The court held:

> The acts of the defendant, as stated in the bill, show that he was creating a public nuisance, by placing obstructions in a stream navigable in fact, for which he might be indicted. In cases of this nature, where the acts which create the public nuisance, cause also private and special injury to the plaintiff, an action at law will lie ….

Id. at 291 [*395-96].

In ***Remington v. Foster***, 42 Wis. 608, 609 (1877), the supreme court addressed the transition from courts of equity to courts of law, stating:

> There is no doubt that the courts of this state still retain the ancient and familiar jurisdiction of courts of equity, to restrain the erection of nuisances, public or private, peculiarly injurious to the party seeking that remedy. But equitable jurisdiction of private suits to abate existing nuisances, public or private, was always of limited and somewhat doubtful nature. Even in suits to restrain the erection of nuisances, courts of equity will not act until the right be established at law; *a fortiori*, not in suits to abate existing nuisances.
>
> Equity sometimes exercised a coy and reluctant jurisdiction of private suits to abate private nuisances,

> because actions at law could give the injured party damages only, from time to time, as they might be suffered, without adequate, permanent remedy.

The court went on to note that legislative action corrected the problem:

> [The revised statutes authorize] judgment of abatement in actions at law for damages by private nuisance. This provision vests in courts of law jurisdiction of the full measure of permanent redress formerly confined to courts of equity in such cases, and, we have no doubt, abrogates the equitable remedy by substituting the legal. It would be a vicious farce, and could not have been within the intention of the statute, for courts of equity to retain a jurisdiction dependent on the judgment of a court of law, and suspended to await such judgment, while the remedy itself is as effectually administered in actions at law. We see no room for doubt of this conclusion.

Id. (citations omitted). *See also* ***Town of Sheboygan v. Sheboygan & Fond du Lac R.R. Co.***, 21 Wis. 675 [*667], 678 [*671] (1867) (even where a town suffers some special injury not common to the whole community, an injunction should not be granted until by an action at law it is established that the acts of the company constituted a nuisance).

More recently, in 1955, our supreme court explained that a court in equity is not prevented from awarding damages even where the nuisance is no longer continuing; specifically, the court stated, "[T]he court acts in its capacity as a court of equity where at the time of the commencement of the action its jurisdiction as such court of equity was properly invoked even though subsequent

events have made the granting of strictly equitable relief impracticable or useless." ***Kamke***, 268 Wis. at 478-79.[5]

Nonetheless, it is the status of the claim in 1848, as treated in the common law of nuisance, that must inform the decision here. As indicated, the law of nuisance was quickly evolving at the time of the Industrial Revolution, the equitable and legal distinctions were developing, and jurisdictions were not in agreement as to a party's right to a jury.

CONCLUSION

Whether a party subject to forfeitures and penalties under Wisconsin's environmental protection statutes and regulations is entitled to a jury trial is a novel and important question. A decision by the supreme court will develop and clarify the law, assuring that the constitutional right to a jury trial is not inconsistently interpreted. A pronouncement of the law in this regard will have widespread impact on environmental protection actions throughout the State. For these reasons, we respectfully request that the supreme court accept certification of the issue.

[5] Here, it appears the opposite has occurred. If ECI's facility closed more than one year prior to the initiation of the State's lawsuit, the only practicable relief at the time of the commencement of the action was monetary.